STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 13, 2014
v	No. 311726 Allegan Circuit Court
DANNON LEWIS ANES, Defendant-Appellant.	LC No. 11-017191-FC

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f). We affirm.

Defendant and the victim met at a bar on the night of March 11, 2011. They later drove to the victim's house. The victim testified that when they entered the house, she made drinks for the two of them in the kitchen, where they kissed. As they moved into the living room, defendant came up behind her, pushed her face down on top of a chaise lounge, and proceeded to anally and vaginally penetrate her with his penis. The victim testified that the encounter was nonconsensual and that during the encounter, she elbowed defendant, tried to "squirm and move," repeatedly told him to stop and began screaming and crying. Defendant claimed the encounter was consensual. After defendant left the victim's home, she called 911 and reported that defendant had raped her. The responding officers observed that the victim was very distraught and that there was a bloodstain on the carpet near where defendant and the victim had sex. The victim's consent was the only disputed material issue at trial.

On appeal, defendant first argues that the prosecutor committed misconduct during her closing argument by vouching for the victim's credibility and telling the jury that defendant was lying. We disagree. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). "[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). A defendant pressing an unpreserved claim of prosecutorial misconduct "must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error

seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010).

"The prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness." *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010), rev'd on other grounds 491 Mich 339 (2012). "The danger is that the jury will be persuaded by the implication that the prosecutor has knowledge that the jury does not and decide the case on this basis rather than on the evidence presented." *Bennett*, 290 Mich App at 477. However, "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (citations omitted).

Here, the prosecutor repeatedly stated that the victim was telling the truth and that defendant was lying. Reviewing the record and the full context of the prosecutor's challenged statements, however, it is apparent that her statements relied on evidence admitted at trial and reasonable inferences arising therefrom that were consistent with the prosecution's theory that the victim did not consent to defendant's sexual conduct. *Id*. Moreover, with regard to the prosecutor's vouching for the victim's credibility, "a prosecutor may comment on his or her own witnesses' credibility, especially when credibility is at issue. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility." *Bennett*, 290 Mich App at 478. And with respect to the prosecutor's statements that defendant was lying, where a defendant takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness . . . ." *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995) (internal quotation omitted). Prosecutors are not required to confine argument to the blandest of possible terms, and in fact may use colorful rhetoric when making arguments. *People v Fyda*, 288 Mich App 446, 462; 793 NW2d 712 (2010). Thus, defendant has not shown that the prosecutor's closing argument constituted misconduct and plain error. Furthermore, the trial court instructed the jury to limit its consideration to the evidence properly before it and that the attorneys' statements and arguments were not evidence. Thus, defendant has not shown that any misconduct regarding the prosecutor's closing argument affected his substantial rights. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant next argues that his trial counsel was ineffective for failing to object to the alleged acts of prosecutorial misconduct during the prosecutor's closing argument. Given that the prosecutor's challenged statements were not improper and did not constitute misconduct, defense counsel was "not ineffective for failing to make a futile objection." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007); *Laidler*, 291 Mich App at 202 ("[B]ecause the prosecution's argument was not improper, defense counsel was not ineffective for failing to object. Counsel is not ineffective for failing to raise a meritless objection.").

Defendant next argues that he is entitled to a new trial on the basis that he was denied his right to a fair and impartial jury. We disagree. We review "for abuse of discretion a trial court's rulings on challenges for cause based on bias." *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes." *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008) (quotation and alteration removed). "However, to the extent our analysis involves

interpretation of a court rule, our review is de novo." *People v Eccles*, 260 Mich App 379, 382; 677 NW2d 76 (2004).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20. "However, . . . jurors are presumed to be . . . impartial, until the contrary is shown. The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *Miller*, 482 Mich at 550 (citation and quotation omitted). "A prospective juror is subject to challenge for cause on any ground set forth in MCR 2.511(D)[.]" MCR 6.412. MCR 2.511(D)(6) provides: "It is grounds for a challenge for cause that the person . . . has already sat on a trial of the same issue[.]"

During voir dire, it was revealed that a number of the potential jurors served on one of two recent cases involving CSC charges. The record indicates that two cases progressed "almost simultaneously" and both concluded approximately two weeks before defendant's trial began on May 15, 2012. Defense counsel argued that all of the jurors who served on one of the two previous cases should be excused for cause under MCR 2.511(D)(6) because those jurors "already sat on a trial of the same issue." The trial court denied defendant's challenge for cause, finding that neither of the two previous cases amounted to "a trial of the same issue" pursuant to MCR 2.511(D)(6). In so finding, the trial court noted that the two previous cases involved different CSC charges (CSC II and CSC III, respectively) and significantly different facts, and that neither previous case involved the issue of consent, which was dispositive to defendant's case.

MCR 2.511(D) does not define the term "same issue;" and this Court did not find any authority interpreting or applying MCR 2.511(D)(6).

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, the rule at issue here must be construed in accordance with the ordinary and approved usage of the language employed, and in light of its purpose and the object to be accomplished by its operation. [*Eccles*, 260 Mich App at 382 (citation and quotations omitted).]

"In ascertaining the meanings of words, this Court may refer to dictionaries for guidance." *People v DeKorte*, 233 Mich App 564, 569; 593 NW2d 203 (1999). Random House Webster's College Dictionary provides the following definition of "issue:" "a point in question or a matter that is in dispute." *Random House Webster's College Dictionary* (2000). Moreover, this Court must construe the language of MCR 2.511(D)(6) "in light of its purpose and the object to be accomplished by its operation." *Eccles*, 260 Mich App at 382. In *Eccles*, we explained the purpose of permitting a challenge for cause under the grounds listed in MCR 2.511(D):

> The . . . grounds listed in MCR 2.511(D) on which a party may challenge a juror for cause fall into two principal categories. The first is that the person is not statutorily qualified to act as a juror. The second is that the juror is biased, *i.e.*, that the juror has preconceived opinions or prejudices, or such other interest or limitations as would impair his or her capacity to render a fair and impartial verdict. [*Id*. (quotation omitted).]

The dictionary definition of "issue" supports the trial court's finding that neither of the two previous cases involved the same issue as the present case because neither previous case involved the dispositive question of consent that was center to this case or involved CSC I charges. Moreover, in light of the purpose of permitting a challenge for cause under MCR 2.511(D), which is to exclude a juror who "has preconceived opinions or prejudices," it is reasonable to focus on whether the question or matter in dispute is similar between the two cases. See *Eccles*, 260 Mich App at 382 (citation and quotations omitted).

Moreover, even if we found that the trial court abused its discretion by denying defendant's challenge for cause, defendant is not entitled to relief absent a showing that this error prejudiced his right to a fair and impartial jury. In *Miller*, 482 Mich at 546, our Supreme Court addressed whether the defendant was "entitled to a new trial as a result of" a "convicted felon having served on his jury" to contrary MCL 600.1307a(1). The Supreme Court held:

> Although a criminal defendant has a constitutional right to be tried by an impartial jury, a criminal defendant does not have a constitutional right to be tried by a jury free of convicted felons. Instead, the right to a jury free of convicted felons is granted by statute. And by statute, a violation of this 'right' only requires a new trial if the defendant demonstrates that such a violation 'actual[ly] prejudice[d]' him. MCL 600.1354(1). [*Miller*, 482 Mich at 547-548 (citations and footnote omitted).]

Here, defendant provides no authority supporting that he had a constitutional right to be tried by a jury free of jurors who have already sat on a trial involving the same issue; rather, defendant's right to a jury free of jurors who have "already sat on a trial of the same issue" is granted by court rule, i.e., MCR 2.511(D)(6). Thus, under the reasoning of our Supreme Court, we look to the court rules to determine the proper remedial standard to apply to a violation of MCR 2.511(D)(6). *Id*. MCR 2.613(A) provides that "an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial . . . unless refusal to take this action appears to the court inconsistent with substantial justice." Here, all of the potential jurors who served on either of the two previous trials testified that they could be impartial. Nothing in the record indicates that these jurors' previous jury service prevented them from being fair and impartial when trying defendant's case. Accordingly, this Court would not grant defendant a new trial for any error related to the jury herein. MCR 2.613(A). See *Miller*, 482 Mich at 553-554.

Defendant also appears to raise a claim of error regarding a juror who was a victim of sexual abuse as a child. This argument is meritless. During voir dire, the juror testified that she "could judge fairly" and that she did not have any predisposed inclination in favor of the prosecution. Defense counsel did not try to excuse the juror for cause or use a peremptory challenge. On appeal, defendant simply provides a conclusory statement that "due to juror ['s] history as a victim of sexual misconduct, [] she could not be fair and impartial in this case and should have been removed." Defendant provides no further articulation regarding this contention and fails to cite any supporting authority. Accordingly, defendant has abandoned any argument regarding the juror. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory

treatment [of an issue] with little or no citation of supporting authority." *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) (alteration in original; quotations omitted).

Finally, defendant argues that the trial court erroneously precluded the admission of evidence regarding the victim's behavior toward defendant at the bar on the night in question and regarding an altercation the victim had approximately six months after the night in question. We review defendant's preserved evidentiary issues for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A preserved claim of evidentiary error "does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotations omitted).

At a pretrial motion hearing, defense counsel stated that defendant wished to present testimony from witnesses at the bar on the night in question that would establish that the victim "singled[d] out" defendant as the person she "wanted to go home with." Defense counsel stated, "What I am focusing on is [the victim's] conduct with [defendant]. The dancing and the intimate talks in the parking lot and the hugging and all those things that show that she was consenting to what was happening that lead up to her inviting him to her home[.]" Defense counsel also stated he had "been told by some witnesses that [the victim] was trying to grab men's crotches, including [defendant], and some other men." At the same hearing, defendant also sought to admit evidence that the victim assaulted the mother of his child, Ms. Spencer, who was also a potential defense witness. The trial court ruled that defense witnesses would be allowed to testify that defendant and the victim were together at the bar, that they danced together, "that they engaged in some intimate talk and that they hugged[.]" However, the trial court held that any testimony that the victim "grabbed the defendant's crotch" was inadmissible under the rape-shield statute. The trial court further ruled that evidence of the victim's altercation with Spencer was inadmissible under MRE 403.

We first note that defendant has abandoned any claim of error regarding the admission of evidence of the victim's altercation approximately six months after the night in question. On appeal, defendant acknowledges that the trial court precluded evidence of the victim's altercation under MRE 403, but defendant fails to discuss MRE 403 or the proffered evidence's admissibility under MRE 403. Defendant merely provides a cursory assertion that "[t]estimony of [the victim's] starting an altercation with" Spencer was a "critical piece[] of information that the jury should have had knowledge of before reaching a verdict." Defendant does not explain this statement or provide any supporting authority. Thus, because defendant did nothing more than announce his position, the issue is abandoned. *Schumacher*, 276 Mich App at 178.

Regarding the trial court's other evidentiary ruling, Michigan's rape-shield statute, MCL 750.520j, precludes admission of "specific instances of the victim's sexual conduct . . . unless and only to the extent that" the proposed evidence is "[e]vidence of the victim's past sexual conduct with the actor" or "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MCL 750.520j(1). Moreover, the rape-shield statute only allows such evidence if the trial court finds that it "is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1). On appeal, defendant argues that evidence of the victim's "public behavior toward [defendant] is admissible in spite of the rape-shield statute because the accusations are allowed

by the text of the statute." However, defendant does not explain this statement or provide any supporting authority; moreover, at the pretrial motion hearing, defense counsel specifically stated that the proffered evidence did not fall under either of the enumerated categories of evidence allowed under the rape-shield statute. Thus, defendant has abandoned his argument that the proffered testimony was "allowed under the text of" the rape-shield statute. *Schumacher*, 276 Mich App at 178.

Defendant offers a general argument that precluding evidence of the victim's behavior toward defendant on the night in question violated his right to confront the victim. Our Supreme Court stated that, "in certain limited situations," the admission of evidence of a victim's sexual conduct "may be required to preserve a defendant's constitutional right to confrontation." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Our Supreme Court enumerated specific instances in which the evidence of a victim's sexual conduct may be admissible even if it is not allowed under the language of the rape-shield statute:

> For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [*Id*. at 348-349.]

However, none of the instances enumerated in *Hackett*, apply to the present case. Defendant did not proffer the challenged evidence to show the victim's bias or her "ulterior motive for making a false charge[;]" and the evidence did not support that the victim had "made false accusations of rape in the past." *Id*. Furthermore, the proffered evidence of the victim's behavior toward defendant at the bar would presumably go to her testimony that she did not consent to defendant's sexual conduct later that night. At trial, defendant was permitted to present evidence that the victim was flirtatious and physically affectionate toward him at the bar. Ultimately, defendant has not shown that the trial court abused its discretion by precluding the challenged evidence or that this ruling violated his right to confront the victim.

Affirmed.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering